United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

200

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19779

REGINALD E. GATLIN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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Cr. No. 370–65.

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 30 1966

Nathan J. Paulson
CLERK

QUESTIONS PRESENTED

Appellee believes that the following questions are presented:

(1) Did the trial court err by allowing counsel for a co-defendant to introduce appellant's unsolicited letter after appellant had admitted his guilt on the stand and insisted that the letter be read to the jury?

(2) Does the eight-month interval between arrest and trial render this conviction invalid where the delay had no prejudicial effect upon appellant's defense and his counsel requested a large portion of the delay?

(3) Having received less than the maximum sentences prescribed for his offenses, may appellant nonetheless seek credit for some of the time spent in jail awaiting trial.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On December 7, 1964, appellant was shot and wounded during the holdup of a liquor store in Washington, D.C. A complaint was filed on December 28, 1964, charging him with attempted robbery while armed. On April 5, 1965, the grand jury indicted appellant, together with John A. Johnson and Ray Jones, Jr., in four counts for (1) assault with intent to commit robbery, (2) assault with intent to commit robbery while armed with a dangerous weapon, and (3 and 4) assaults upon two policemen.

Appellant pleaded not guilty to these charges on April 9, 1965, having been assigned counsel that day. Then followed a series of motions and hearings. On May 21, 1965, a motion by the co-defendants to suppress certain evidence was argued in part and continued to May 28, 1965, when it was denied by Judge Matthews. In the interim, Judge McGuire continued the trial date from the week of May 31, 1965, to the week of

June 7, 1965, because a witness for the prosecution was on leave from the police force and the motions to suppress were pending. On June 4, 1965, appellant's counsel was relieved and another counsel appointed for him. The trial date was continued until the week of June 28, 1965, to allow newly-appointed counsel time to become acquainted with the case. On June 18, 1965, Judge Curran heard and granted a motion for production and inspection of evidence, as well as a motion by co-defendants to sever offenses, but denied a motion for severance of defendants. On June 24, 1965, appellant's counsel asked for an additional continuance from the week of July 1, 1965 to the fall term of the court. Judge Curran accordingly ordered the trial postponed. Two weeks later the co-defendants sought to examine grand jury minutes; after argument Judge Walsh denied their motion. The request for relief from prejudicial joinder of defendants was unsuccessfully renewed on August 5, 1965.

Although called for trial on August 12, 1965, the case was continued because two motions were pending. One of these, a motion by co-defendants to dismiss for lack of speedy trial was heard and denied by Judge Hart on August 16, 1965. The other, appellant's motion for dismissal on the same ground, was heard and denied by Judge Gasch on August 18, 1965. Trial then commenced on August 24, 1965.

At the end of the six-day trial, the jury found appellant guilty on all counts of the indictment. The trial court imposed a five-to-fifteen year sentence for the assaults charged in the first two counts, and one-to-three year sentences for the assaults upon the police officers, these sentences to run concurrently with each other and consecutively with a sentence being served for his conviction in Criminal No. 644–64.

STATUTES AND RULE INVOLVED

Title 22, District of Columbia Code, Section 501, provides:

> Every person convicted of any assault with intent * * * to commit robbery * * * shall be sentenced to imprisonment for not more than fifteen years.

Title 22, District of Columbia Code, Section 505(a), provides:

> Whoever without justifiable and excusable cause, assaults, resists, opposes, impedes, intimidates, or interferes with any officer or member of any police force operating in the District of Columbia while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than five years or both.

Title 22, District of Columbia Code, Section 3202, provides in pertinent part:

> If any person shall commit a crime of violence in the District of Columbia when armed with or having readily available any pistol or other firearm, he may, in addition to the punishment provided for the crime, be punished by imprisonment for a term of not more than five years; * * *

Rule 48(b), Federal Rules of Criminal Procedure, provides:

> *By Court.* If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

SUMMARY OF ARGUMENT

While in custody appellant wrote a letter to his co-defendant's counsel stating that the co-defendant had not participated in the attempted robbery with him, and the trial court allowed that counsel to put the letter into evidence. Appellant's attack on this ruling is fatuous. The record shows that appellant wrote the letter on his own initiative shortly after indictment. Before admitting the document, the judge determined not only that it had been unsolicited, but also that appellant wanted it to be introduced. Moreover, the co-defendant's counsel read the letter to the jury after they had already heard appellant make a complete confession on the stand. The argument on this appeal merely amounts to an attempt to repudiate the strategy adopted at trial; it presents no ground for finding error.

The interval between indictment and trial impinged upon none of appellant's rights. Appellant was shot and wounded while attempting to rob the liquor store. Four months later the grand jury indicted him for assaults committed in the course of the holdup. In the interim, appellant began serving a sentence imposed for an unrelated offense. A change of court-appointed counsel and preliminary skirmishes then delayed the trial for another four months. Appellant's own admission of guilt when he testified at trial dispels any suggestion that the eight-month interval harmed the preparation of his defense. Nor can this delay be called oppressive simply by reason of appellant's confinement, especially since he spent half of this time under sentence for another crime.

The trial court sentenced appellant to less than the maximum terms of imprisonment for his offenses. This precludes him from seeking credit on his sentence for the time spent in jail between arrest and indictment.

ARGUMENT

I. The trial court did not err by permitting co-defendant's counsel to introduce a letter written by appellant

(Tr. 474–476, 484, 497, 499–500, 503–505)

Appellant contends that it violated his constitutional rights for Johnson's counsel to introduce a letter that he wrote while in custody and allegedly without effective assistance of counsel. This contention completely ignores the conduct of appellant's defense, the nature of the letter, and the circumstances under which the letter was received into evidence.

After completion of the prosecution's case, appellant chose to testify in his own behalf. He made this decision against the advice of his counsel. For this reason, the trial court made the following inquiry before receiving his testimony:

> THE COURT. Mr. Gatlin, I understand your counsel has talked to you about whether or not you should take the witness stand?
>
> DEFENDANT GATLIN. Yes, sir.

THE COURT. And he has advised you that you do not have to take the stand?

DEFENDANT GATLIN. Yes, sir.

THE COURT. And that you insist on taking it anyway?

DEFENDANT GATLIN. Yes, sir.

THE COURT. I want it very clear on the record that this is your own choice and against the advice of your counsel; is that so?

DEFENDANT GATLIN. Yes, sir.

THE COURT. Anything else?

Mr. LIFF [appellant's counsel]. Nothing, Your Honor.

THE COURT. Very well.

Mr. LIFF. You are clear you do not have to?

THE COURT. You understand the consequences; anything can be used against you if you are on the stand; your past record as well as everything else?

DEFENDANT GATLIN. Yes, sir.

THE COURT. Very well. It is your own choice. (Tr. 474–475).

Appellant then took the stand and, in response to questions from his own attorney, admitted that he entered the Big "D" Liquor Store on December 7, 1964, with a revolver, having "in mind the idea of robbing that store." (Tr. 476). He denied, though, that Johnson was with him. (Tr. 484). On cross-examination by the prosecutor, appellant again stated that he was carrying a loaded gun, that he intended to use it to hold up the liquor store, but that Johnson did not accompany him.

After this testimony, Johnson's counsel informed the court that he wanted to put appellant back on "the stand to identify a document." Counsel identified the document as a letter written by appellant from the district jail stating that Johnson was not one of appellant's accomplices in the attempted robbery. In view of objections by both appellant's counsel and the prosecutor (Tr. 497), the judge sought to make certain that appellant fully understood his rights. The following colloquy occurred at the bench:

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> THE COURT. Mr. Gatlin, there has been a question raised as to whether or not you should become a witness for Mr. McGrail. Your own counsel advises against it; he does not want you to take the stand again.
>
> What do you want to do?
>
> DEFENDANT GATLIN. I'll take the stand. (Tr. 499–500).

Despite appellant's express willingness to testify again, the judge insisted upon first hearing the letter—described as notarized and entirely in appellant's handwriting—out of the presence of the jury. The judge thereafter ruled that he would allow Johnson's counsel to question appellant "simply for the purpose of identifying the document." (Tr. 503–504). With an abundance of caution, the judge not only assured himself that the letter was unsolicited by Johnson or his counsel, but further questioned appellant:

> THE COURT. Again, Mr. Gatlin, you are being advised by counsel not to take the stand; not to give any further testimony. You heard that letter read; do you want to put that in evidence?
>
> DEFENDANT GATLIN. Yes, sir.
>
> THE COURT. Against the advice of your counsel?
>
> DEFENDANT GATLIN. Yes, sir. (Tr. 504–505).

Thereafter, Johnson's counsel called appellant as a witness, established by his testimony that appellant had written the letter, and read the letter to the jury.

It may thus be seen that appellant himself insisted upon verifying the letter and having it read to the jury, despite the oft-repeated advice of his trial counsel, and the prosecutor's initial objection. The judge admitted the letter only after he determined that appellant wanted the evidence to be heard and understood the consequences of his action. Faced with an airtight case against him, appellant sought to exculpate Johnson by having the latter's counsel read a letter in which appellant denied that Johnson had participated in the attempted robbery. It is inconsistent for him now to argue that the admission of this letter was erroneous. Moreover, appellant had already confessed on the stand to the attempted robbery

before the letter was read to the jury. This judicial admission in itself precludes any attack upon the subsequent introduction of the letter. *Ercoli* v. *United States,* 76 U.S. App. D.C. 360, 131 F. 2d 354 (1942) (although accused objected to introduction of confession, his admission of the same facts in his own testimony deemed an express waiver); *Murray* v. *United States,* 53 U.S. App. D.C. 119, 288 Fed. 1008, *cert. denied,* 262 U.S. 757 (1923) (objection to extra-judicial statement overruled; later defense testimony to same effect and defendant's acknowledgment of statement cured error). *Cf. Cantrell* v. *United States,* 116 U.S. App. D.C. 311, 323 F. 2d 613 (1963). Having judicially confessed to the acts charged in the indictment, appellant cannot seek reversal on the ground that a duplicate but extra-judicial statement was thereafter introduced.

Anyway, the premise that the letter was executed by appellant under circumstances which violated his constitutional rights is faulty. Simply because he wrote the letter while in custody does not make it inadmissible. *Jackson* v. *United States,* 119 U.S. App. D.C. 100, 337 F. 2d 136 (1964), *cert. denied,* 380 U.S. 935 (1965) (voluntary confession to police admissible though made without counsel). There is no indication in the record that the letter resulted from any police conduct, or that appellant was interrogated in the absence of his assigned counsel. Nor does appellant aver that the letter was the product of any police activity.[1] Nonetheless, he argues that "no confession made in the absence of counsel while the defendant is in police custody may be admitted into evidence." But precedent utterly refutes this blanket proposition. Indeed, this Court has explicitly held that *Escobedo* v. *United States,* 378 U.S. 478 (1964), does not render 'inadmissible all uncounseled utterances made by an accused or arrested person." *Cephus* v. *United States,* 122 U.S. App. D.C. 187, 189, 352, F. 2d 663, 665 (1964), *cert. denied,* 382 U.S. 897 (1965). Without exception, the cases cited by appellant involve the deliber-

[1] Appellant's suggestion that he might have been subjected to coercion from an unknown source is flatly contradicted by testimony in the record that neither Johnson nor his attorney solicited the letter.

ate extraction of confessions by law enforcement officers,[2] or the procurement of an incriminating statement by surreptitious means.[3] The unsolicited mailing of a statement to co-defendant's counsel lies outside any conceivable application of the principles behind those decisions. For instance, *Miranda* v. *Arizona*, 384 U.S. 436 (1966), was expressly limited to "in-custody interrogation":

> In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influence is, of course, admissible in evidence. 384 U.S. at 478.

The inability to specify "any compelling influences" belies appellant's claim that his rights were not observed. In any event, an extension of the requirements enunciated in *Miranda* cannot be applied retroactively to this case. *Johnson & Cassidy* v. *New Jersey*, 384 U.S. 719 (1966); *Clifton* v. *United States*, D.C. Cir. No. 19757, decided November 15, 1966, slip op. at 3, n. 2; *Coleman* v. *United States*, D.C. Cir. No. 19662, decided July 14, 1966, slip op. at 2, n. 1; *Luckett* v. *United States*, D.C. Cir. No. 19111, decided July 12, 1966.

II. The interval between appellant's arrest and trial amounted to neither a denial of his right to a speedy trial nor an undue delay within the meaning of Rule 48(b)

Appellant contends that the eight-month interval between his arrest and trial deprived him of a fair and speedy trial. But this delay in itself does not amount to an abridgement of constitutional guarantees. *Hedgepeth* v. *United States*, —— U.S. App. D.C. ——, 365 F. 2d 952, 954 (1966). Appellant's conviction must stand unless he shows that the delay was "arbitrary, purposeful, oppressive or vexatious," *Smith* v. *United States*, 118 U.S. App. D.C. 38, 41, 331 F. 2d 784, 787

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[2] *E.g., Escobedo v. Illinois*, 378 U.S. 478 (1964); *Johnson* v. *United States*, 120 U.S. App. D.C. 67, 344 F. 2d 163 (1964).

[3] *E.g., Massiah* v. *United States*, 377 U.S. 201 (1964).

(1964) (*en banc*), and that he suffered some prejudice from the delay. *Powell* v. *United States*, 122 U.S. App. D.C. 229, 352 F. 2d 705 (1965). Just last term, in *United States* v. *Ewell*, 383 U.S. 116, 122 (1966), the Supreme Court held that "insubstantial" and "speculative" claims of prejudice from a delay of 19 months between arrest and indictment would not support motions to dismiss indictments for denial of the right to speedy trial.[4] And this Court has recently interpreted *Ewell* to mean that appellant has to show "the likelihood, or at least reasonable possibility, that [he] has been prejudiced by the delay." *Hedgepeth* v. *United States*, —— U.S. App. D.C. ——, 364 F. 2d 684, 687 (1966). Appellant's brief contains no such allegations.

The mere fact that appellant was confined between arrest and indictment does not constitute the type of prejudice that must be shown to establish violation of constitutional rights.[5] See *Hood* v. *United States*, —— U.S. App. D.C. ——, 365 F. 2d 949 (1966) (delay of 106 days between arrest and indictment); *Hankins* v. *United States*, D.C. Cir. No. 20315, aff'd by order filed December 9, 1966 (73-day delay). And appellant suggests no other way in which he might have been disadvantaged by this delay. This failure to assert that any prejudice resulted from the delay between arrest and indictment compels rejection of appellant's prayer for reversal. See *Hedgepeth* v. *United States*, —— U.S. App. D.C. ——, 365 F. 2d 952 (1966). While "unexplained" delays before indictment should not be condoned,[6] the record gives no indication that the delay in this instance resulted from "negligence or callous indifference" approaching constittuional proportions. *Hedgepeth* v. *United States*, —— U.S. App. D.C. ——, 364 F. 2d 684, 688 (1966).

There is even less reason for appellant to complain about the interval between indictment and trial since he was then

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[4] The delay there was due to the fact that the indictments under attack were not brought until appellants' convictions for related offenses had been vacated on collateral attack.

[5] Though the record is not clear on this point, appellant was forced to spend at least part of this time in the hospital recovering from his gunshot wound.

[6] The delay partly reflects the need to assemble evidence against appellant and his co-defendants on a number of related charges.

serving the sentence imposed in Criminal No. 644–64. Shortly after indictment, April 19, 1965, appellant wrote a self-incriminating letter designed to exonerate Johnson. Though he can hardly attribute his action to the lapse of time before trial, appellant intimates that an alert attorney might have stopped him. And construed as a claim that he received ineffective assistance of counsel, appellant's argument is frivolous. It is difficult to imagine that greater diligence on the part of his initial court-appointed attorney would have made any difference since appellant's trial counsel could not dissuade him from admitting his guilt and verifying the letter in open court. The record leaves no doubt that appellant himself chose to execute a document which might help his co-defendant. And his counsel on appeal offers no reason to assume that the delay before trial had the slightest effect on this decision.

The fact that appellant's trial counsel caused most of the delay between indictment and trial, *i.e.*, 70 days, by requesting continuances to more fully prepare the case, further vitiates appellant's argument.[7] See *Mann* v. *United States*, 113 U.S. App. D.C. 27, 304 F. 2d 394 (1962); *King* v. *United States*, 105 U.S. App. D.C. 193, 265 F. 2d 567, *cert. denied*, 359 U.S. 998 (1959). The rest of the post-indictment interval represents nothing more than the ordinary period required for the lower court to rule upon defense motions. See *Hankins* v. *United States*, D.C. Cir. No. 20315, aff'd by order filed December 9, 1966 (delay of 98 days after indictment, coupled with prior 73-day delay between arrest and indictment). These circumstances fully explain and justify the length of time between indictment and trial.

There is similarly no basis for appellant's contention that the charges against him should have been dismissed under Rule 48(b), F.R. Crim. P., for "unnecessary delay" between arrest and trial. A motion under Rule 48(b) is entrusted to the sound discretion of the trial judge. His ruling on such a motion to dismiss will be reversed only for an abuse of discretion, that is, only upon a showing that he acted in a "clearly un-

[7] The prosecution certainly cannot be blamed for the court-appointed counsel's alleged inattention to the case. At most, only a one-week continuance may be attributed to the prosecution.

reasonable manner." *Nickens* v. *United States*, 116 U.S. App. D.C. 338, 341, 323 F. 2d 808, 811 (1963). This requires more than unsupported claims of prejudice from the delay.

III. Since appellant received less than the maximum sentences attached to the offenses for which he was convicted, it must be presumed that he received credit for the time spent in custody before trial

(Tr. 480)

This Court's decision in *Stapf* v. *United States*, —— U.S. App. D.C. ——, 367 F. 2d 326 (1966), fully answers appellant's contention that "the court below should have applied a credit in imposing sentence on appellant for the time which he spent in custody" before his trial. The *Stapf* opinion explicitly held:

> Wherever it is possible, as a matter of mechanical calculation, that credit could have been given, we will conclusively presume it was given. The problems and expenditure of resources which would be caused by allowing each prisoner to attempt to demonstrate that in his particular case credit was not given, we feel, outweigh any possible unfairness. 367 F. 2d at 330.

And a footnote at that point added:

> It is obvious, but we wish to note expressly, that our decision is not equivalent, either in intent or effect, to a retroactive application of the 1966 law, which extends an administrative credit to all sentences, even though substantially below the maximum term. 367 F. 2d at 330, n. 11.

There can be no doubt that the rule enunciated in *Stapf* governs the present case. Appellant received only concurrent one-to-three year sentences for two assaults upon police officers, an offense carrying a penalty of not more than five years imprisonment (22 D.C. Code § 505). His other concurrent five-to-fifteen year sentence for assault with intent to rob while armed with a dangerous weapon was also less than the maximum penalty prescribed for that combined offense.[8] By itself,

[8] Though a phrase in the trial court's order inadvertently refers to "sentences on counts one and two," the order must be interpreted as imposing

an assault with intent to rob may be punished by imprisonment for not more than fifteen years (22 D.C. Code § 501). The fact that appellant committed this crime while armed with a dangerous weapon authorized the trial court to impose an additional sentence "for a term of not more than five years" (22 D.C. Code § 3202). Hence, appellant could have received a maximum sentence of twenty years. Since the trial court gave less than the maximum sentence for each of these offenses, the sentence cannot be attacked on the ground that it failed to reflect the time which appellant spent in custody before trial.

Even were it not foreclosed by the decision in *Stapf*, appellant's argument comes at the wrong time. His failure to object to the sentence when imposed or petition the lower court for its reduction prevents him from raising the issue now. In a similar situation, this Court has held that an "appeal from a conviction is not a proper occasion to consider this sentencing and credit question." *McCoy* v. *United States*, D.C. Cir. No. 19457, decided October 27, 1966.[9]

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but one sentence for both counts. The jury's verdict on the second count of the indictment charging that appellant was armed with a dangerous weapon simply empowered the judge to add another five years to the specified maximum punishment for the assault with intent to rob. He therefore could not have intended to impose a separate five-to-fifteen year sentence.

[9] A chronological account of the events preceding appellant's present conviction points up a further flaw in his argument. Appellant was arrested in June 1964 and indicted the next month for housebreaking and larceny. (Criminal No. 644–64). Following his release on bail, appellant attempted to rob the liquor store. Shot at the scene, he was taken to a hospital (Tr. 480), and later transferred to the district jail. These circumstances caused his counsel in Criminal No. 644–64 to request a continuance of trial date from January 4, 1965, to the end of February. On February 23, 1965, appellant pleaded guilty to unlawful entry and petit larceny; a week later, the trial court gave him consecutive sentences of six months and one year. Two motions for reduction of sentence were denied.

Thereafter, appellant was indicted, tried, convicted, and sentenced for the assaults committed in the course of the attempted robbery. He now wants this sentence reduced by the period spent in custody between the attempted holdup (December 7, 1964) and the imposition of sentence in Criminal No. 644–64 (April 2, 1965). Besides the fact that appellant needed part of this time to recuperate from his wound, it would appear more appropriate for him to seek credit with respect to his sentence in Criminal No. 644–64, since it must be completed before the sentence under attack takes effect.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

421

No. 19,779

Reginald E. Gatlin, Appellant,

v.

United States of America, Appellee.

APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

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STATEMENT OF QUESTIONS PRESENTED

1. Whether appellant was denied due process and his constitutional rights to effective representation of counsel and freedom from compelled self-incrimination by the admission into evidence of a sworn statement incriminating himself, executed while held in police custody and without benefit of counsel, absent a showing that appellant had been warned of his rights and had waived them intelligently.

2. Whether appellant was denied due process and his constitutional rights to a speedy trial and effective representation by counsel by the government's unreasonable and unwarranted delays in prosecuting appellant.

3. Whether appellant should have been given credit on his sentence for time spent in police custody in relation to the offenses for which sentence was imposed.

BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,779

Reginald E. Gatlin, Appellant,

v.

United States of America, Appellee.

APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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JURISDICTIONAL STATEMENT

On December 7, 1964, appellant was arrested at the scene of an attempted robbery by the Metropolitan Police. On December 28, 1964, a complaint was filed charging him with the attempted robbery, while armed, of the Big "D" Liquor Store in the District of Columbia. On April 5, 1965, the grand jury indicted the appellant on four counts for (1) assault with intent to rob one, Leon Berez; (2) assault with intent to rob one, Leon Berez, while armed; (3) assaulting Joseph T. Kaclick, a member of the Metropolitan Police, while in the performance of his official duties; and (4) assaulting Donald E. Blake, a member of the Metropolitan Police, while engaged in the performance of his official duties.

After pleading not guilty on April 9, 1965, appellant was tried together with Ray Jones, Jr. and John A. Johnson and found guilty by a jury on all counts of the indictment on September 1, 1965. Appellant was sentenced by the Honorable Howard F. Corcoran on October 15, 1965 to from five to fifteen years on Counts 1 and 2 and one to three years on Counts 3 and 4, with all sentences to run concurrently with each other, but consecutively to a sentence now being served under Criminal No. 644-64.

On October 25, 1965, appellant moved for leave to appeal in forma pauperis and on October 29, 1965, Judge Corcoran granted appellant's motion and ordered the preparation of the transcript at the government's expense. The jurisdiction of this court is based on 28 U.S.C. §§ 1291 and 2106.

STATEMENT OF THE CASE

In the early evening hours of December 7, 1964, there was an attempted robbery of the Big "D" Liquor Store in Washington, D. C. On this night in question, Officer Kaclick and Officer Blake, members of the District of Columbia police force, were on stake-out in the back room of the Big "D".

Officer Kaclick testified that he heard someone shout "hold up" and that the door to the store room in which he and Officer Blake were hidden was opened, and appellant appeared holding a revolver. Kaclick testified further that he identified himself as police and said "drop it," whereupon the appellant turned to face him with a gun still in his hand and Officers Kaclick and Blake opened fire. Appellant was shot and fell to the floor of the store room and was no longer a participant in the ensuing gun fight. His gun had not been fired (Tr. 213).[1/]

1/ References to page numbers in the Transcript of Proceedings in the court below are preceded by the abbreviation "Tr."

Appellant was taken into custody by the police immediately following the gun fight.

At the time of appellant's detention on December 7, 1964, the police had all the information needed to bring him to trial for the offenses of which he was ultimately convicted. Yet no indictment was handed down until April 5, 1965. On April 9, 1965, appellant was arraigned and entered a plea of not guilty. Appellant, solely because he was a pauper, did not have effective benefit of counsel until June 7, 1965,[1/] when the court below appointed Charles P. Liff to represent him.

The first trial date, set for the week of May 31, 1965, was continued to the week of June 7, 1965, at the request of the government counsel, because a government witness was on leave from the police force. The second trial date was continued until the week of June 28, 1965, because the appointment of Charles S. Carter, Esq., was vacated and new counsel was appointed. Appellant's new appointed counsel, Charles P. Liff, was forced to seek an additional continuance on the ground that the time of his appointment made it impossible for him properly to represent appellant at the date set.

1/ Charles S. Carter was appointed counsel for appellant on April 9, 1965, and was present at the arraignment. Mr. Carter, however, acted no further on appellant's behalf. See Tr. 507:

> [By McGrail] "I made many an attempt to contact him [attorney Carter]. As the Court knows, ultimately Mr. Carter was relieved as counsel. I think because he was not -- the Court could not even contact him."

Consequently, the trial was set for August 12, 1965. On August 13, 1965, appellant filed a motion to dismiss the indictment for denial of the right to a speedy trial. This motion was denied by the court, "without prejudice to renew the motion at the trial." Trial commenced on August 24, 1965, at which time appellant moved again for dismissal on the ground of denial of a speedy trial. (Tr. 29) Appellant's motion was again denied (Tr. 31). The motion was renewed at the opening of appellant's defense (Tr. 465), and was again denied by the trial court. (Tr. 470)

At the trial, appellant took the stand, against the advice of his counsel. The court advised appellant that he did not have to take the stand and that "anything can be used again [sic] you if you are on the stand; your past record as well as everything else." (Tr. 474)

Appellant testified that he had entered the liquor store on the night in question with the idea of robbing the store, and while armed with a gun. (Tr. 476) He denied knowing of the presence of the policemen or pointing his gun at them. (Tr. 478, 481) Appellant did not at any time seek to change his plea to guilty. It is apparent that appellant's prime motive in taking the stand was to exonerate his codefendant John A. Johnson. (Tr. 483-85) On cross examination by the attorney for the government, appellant's prior record of

convictions on charges of housebreaking, destroying movable property, unlawful entry and petty larceny was brought into the record over objection of appellant's counsel. (Tr. 488-89)

During the course of codefendant Johnson's defense, appellant took the stand a second time, again over objection by his counsel, for the purpose of identifying a statement signed and sworn to by him while he was in police custody and prior to his representation by counsel. (Tr. 508) The statement, which purported to exonerate Johnson but also amounted to a complete confession by appellant of the offenses charged in the first two counts of his indictment, was admitted into evidence and read to the jury by Johnson's counsel. (Tr. 510-11)

On September 1, 1965, appellant was found guilty of four counts of assault with intent to commit robbery, assault with intent to commit robbery while armed with a dangerous weapon, and assaults on two members of the police force. On October 15, 1965, appellant was sentenced to imprisonment for a period of five to fifteen years on each of the first two counts and one to three years each on counts three and four. The sentences on all of these counts were to run concurrently, and to run consecutively to a sentence then being served under Criminal No. 644-64. The latter

sentence was commenced on April 2, 1965. No credit was given appellant by the sentencing judge for the time spent in police custody from December 7, 1964, until April 2, 1965. Likewise, no administrative credit under 18 U.S.C. § 3568 has been given for this time.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Fifth Amendment:

> "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . nor be deprived of . . . liberty . . . without due process of law . . . ."

Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; . . . and to have the Assistance of Counsel for his defence."

18 U.S.C. § 3568 (1964):

> "The sentence of imprisonment of any person convicted of an offense in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence: Provided, That the Attorney General shall give any such person credit toward service of his sentence for any days spent in custody prior to the imposition of sentence by the sentencing court for want of bail set for the offense under which sentence was imposed where the statute requires the imposition of a minimum mandatory sentence.

"If any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, his sentence shall commence to run from the date on which he is received at such jail or other place of detention.

"No sentence shall prescribe any other method of computing the term."

18 U.S.C. § 3568, Public Law 89-465, 80 Stat. 214, 217 (Bail Reform Act of 1966, Approved June 22, 1966) (amending 18 U.S.C. § 3568 (1964)):

* * *

"Sec. 4. The first paragraph of section 3568 of title 18, United States Code, is amended to read as follows:

"The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence. The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed. As used in this section, the term 'offense' means any criminal offense, other than an offense triable by court-martial, military commission, provost court, or other military tribunal, which is in violation of an Act of Congress and is triable in any court established by Act of Congress.

* * *

"Sec. 6. This Act shall take effect ninety days after the date on which it is enacted: Provided, That the provisions of section 4 shall be applicable only to sentences imposed on or after the effective date."

District of Columbia Code
Section 22-501:

> "Every person convicted of any assault with intent . . . to commit robbery . . . shall be sentenced to imprisonment for not more than fifteen years."

District of Columbia Code
Section 22-505:

> "(a) Whoever without justifiable and excusable cause, assaults, resists, opposes, impedes, intimidates, or interferes with any officer or member of any police force operating in the District of Columbia while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than five years or both."

District of Columbia Code
Section 22-3202:

> "If any person shall commit a crime of violence in the District of Columbia when armed with or having readily available any pistol or other firearm, he may, in addition to the punishment provided for the crime, be punished by imprisonment for a term of not more than five years; upon a second conviction for a crime of violence so committed he may, in addition to the punishment provided for the crime, be punished by imprisonment for a term of not more than ten years; upon a third conviction for a crime of violence so committed he may, in addition to the punishment provided for the crime, be punished by imprisonment for a term of not more than fifteen years; upon a fourth or subsequent conviction for a crime of violence so committed he may, in addition to the punishment provided for the crime, be punished by imprisonment for an additional period of not more than thirty years."

Federal Rules of Criminal Procedure
Rule 48(b):

> "If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

STATEMENT OF POINTS

1. The use during trial, at which appellant's guilt or innocence was at issue, of a written confession by appellant which was written over four months after appellant had been jailed without benefit of counsel and without opportunity to secure bail--both of which were caused by appellant's poverty--, violated appellant's constitutional rights and require reversal of appellant's conviction by the court below.

2. The four month's delay between the date of appellant's arrest and the indictment, when the government's case against appellant was complete from the moment of arrest and when there are no legitimate excuses for the government's delay, amounted to a denial of appellant's Fifth Amendment right to due process of law; and the subsequent further delay before the case was tried, where no part of the delay could be said to have been the fault of appellant, amounted to a denial of appellant's Sixth Amendment right to a speedy trial. Further, the court below abused its discretion in refusing to dismiss the indictment upon appellant's timely motion.

3. The sentence imposed upon appellant was unjust and should be modified to give appellant credit for time spent in jail prior to indictment in this case, because appellant, as a pauper, was unable to secure bail.

SUMMARY OF ARGUMENT

I. Appellant, a pauper, was arrested on December 7, 1964 and kept in custody continuously from that date until June 7, 1965 without benefit of counsel. During that period, on April 19, 1965, appellant signed a statement, which purportedly was notarized, that did two things: (1) exculpated appellant's codefendant Johnson and (2) confessed that appellant was guilty of the crime charged. During trial, appellant was called as a witness for the codefendant, and, over objection by appellant's then court appointed counsel, the statement was admitted into evidence. Appellant's guilt or innocence was at issue during the trial.

The exclusionary rule established by the Supreme Court prohibits the introduction of any statement of an accused in the absence of counsel while in police custody, if the accused was not warned of his rights and intelligently waived them. The rule is not limited to confessions resulting from police interrogation, but is applicable to all such statements made by an accused in police custody, whether incriminating or exculpatory and whether introduced by the prosecution, on direct or cross, or by a codefendant. The existence of independent evidence tending to support a conviction is irrelevant, because the admission of a self-incriminating statement in violation of the exclusionary rule requires a reversal of the conviction.

In the instant case, defendant was shut off from the outside in police custody for over four months. He had seen counsel but once--at his arraignment. Ten days later, while appellant was again in jail, the document in question was prepared and was later admitted in evidence during the trial. In view of the foregoing, it is submitted that reversible error occurred when the document was admitted into evidence, because of appellant's lack of counsel, his unusually long confinement and the nature of the document itself.

II. In the instant case, appellant was in custody continuously for four months before he was indicted. Throughout that period the government's case against appellant was complete, and, also throughout that period, appellant sat in jail without benefit of counsel and without the ability to secure his release on bail. There was absolutely no valid reason for the government's delay in obtaining the indictment. It is submitted that this negligent, or purposeful, and oppressive delay denied appellant due process of law as guaranteed by the Fifth Amendment, because (1) of the absence of legitimate reasons supporting the delay, (2) of the prejudice to appellant in that he was forced to remain in custody and he was unable to prepare his defense to the crime charged and (3) of the fact that the delay was arbitrary and oppressive.

After the indictment was returned, another delay of approximately two months occurred before the case was scheduled

for trial--at which time it was finally realized that appellant was not being represented by counsel. On June 7, 1965, effective counsel was appointed, who, of necessity, required a continuance in order to prepare appellant's defense. Trial was ultimately held on August 24, 1965. The delay in securing counsel for appellant is purely the responsibility of the government. Appellant's lack of counsel would have been noted much sooner if the government had proceeded with reasonable diligence, and, therefore, appellant's trial would, or could, have been held months sooner. It is submitted that, coupled with the delay in obtaining the indictment, the lengthy delay in bringing the case to trial violated appellant's right to a speedy trial as guaranteed by the Sixth Amendment.

III. From the date of his arrest until trial appellant was in jail without means to effect his relief on bail. However, no credit was given for the time appellant spent in jail unable to obtain his freedom because of his poverty. The sentence in the instant case is, in effect, 116 days longer than the maximum sentence imposed by the court below. It is clear that, under the statutes and cases referred to below, such credit must be given, and it is accordingly submitted that this court must remand this case with instructions to so modify appellant's sentence.

REFERENCES TO TRANSCRIPT

The Court's attention is respectfully directed to the following pages of the Transcript of Proceeding: 1/

I. Tr. 483-85, 508-11.

II. Tr. 29, 31, 465, 470.

III. None.

1/ The numbered paragraphs herein coincide with those relating to Appellant's argument.

ARGUMENT

I. APPELLANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY ADMISSION, WITHOUT PROOF OF ELEMENTARY PROCEDURAL SAFEGUARDS, OF A SELF-INCRIMINATING STATEMENT MADE WHILE IN POLICE CUSTODY AND WITHOUT BENEFIT OF COUNSEL

Appellant, a pauper, was taken into custody at the scene of the crime on December 7, 1964. Over four months after detention, on April 9, 1965, arraignment was held. Appellant, unable to retain his own counsel, requested that counsel be appointed to advise and represent him, and appellant was represented at the arraignment by an attorney so appointed by the court.

The right to counsel in a Federal criminal prosecution is specifically guaranteed by the Sixth Amendment. Johnson v. Zerbst, 304 U.S. 458 (1938), Massiah v. United States, 377 U.S. 201 (1964). Yet from the day he was taken into custody until the day on which he was arraigned, appellant was never given the opportunity to consult with counsel.[1/] After counsel was appointed at the arraignment, appellant made repeated, unsuccessful efforts to communicate with his appointed counsel.[2/] Finally,

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1/ See Appellant's "Motion to Dismiss Indictment for Denial of Right to Speedy Trial, Para. 3 (August 13, 1965); see also, letter, Reginald E. Gatlin to Charles W. Havens, III, appended hereto.

2/ Ibid.

upon appellant's demand, the court appointed other counsel on June 7, 1965. Thus, except for one single appearance at his arraignment by an attorney entirely unknown to him, appellant, solely because of his poverty, was entirely without benefit of counsel from December 7, 1964, until June 7, 1965 -- a period of 182 days or one-half year. 1/

The case at bar has much in common with a case decided recently by this court ruling on the admissibility, for purposes of impeaching a defendant who has taken the stand, of a confession obtained from the defendant under such circumstances as to render it inadmissible as part of the prosecution's case in chief. Johnson v. United States, 120 U.S. App. D.C. 67, 344 F.2d 163 (1964). In Johnson, police interrogation in the absence of counsel had produced a confession on the part of one of the two defendants. This statement was held to be inadmissible as part of the government's case in chief; the court pointed out that generally such evidence is "inadmissible for all purposes" (344 F.2d at 164), unless the defendant himself introduces the evidence

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1/ During this time, while appellant was without effective benefit of counsel, various proceedings were held and motions were made by codefendants, who were represented by counsel, which could have substantially affected appellant's rights. Ibid. Cf., Powell v. Alabama, 287 U.S. 45 (1932)

or is in some manner estopped from objecting to its use. The court held that, where the defendant did not "of his own accord" exceed the bounds of testimony necessary to his defense by making "sweeping claims," and where the illegally obtained evidence in question amounts to a confession of the very charge on trial, introduction of the tainted evidence "would seriously jeopardize the important substantive policies and functions underlying the established exclusionary rules." 344 F.2d at 166. The same can be said, it might be added, as to the introduction of an illegally obtained confession by a codefendant in the name of "exculpation" particularly when the government has failed to object to the introduction of the tainted evidence and has resisted the various motions for severance of the defendants.

During the time that he was being held in custody without benefit of counsel, appellant in the instant case made two "notarized"[1/] statements, addressed to counsel for his codefendants Johnson and Jones. These statements, purporting to exculpate his two codefendants, amounted to complete confessions of appellant's guilt for offenses to which, on the advice of counsel, he had entered a plea of not guilty only ten days earlier. One of these statements was admitted into evidence in appellant's trial. (Tr. 510)

1/ The record is unclear as to the identity of the notary public or how appellant was afforded the opportunity for access to a notary public. See Tr. 509-11.

Counsel for codefendant Johnson read appellant's statement into the record as an essential element of Johnson's defense. The prosecuting attorney, who had resisted the earlier motions by appellant and his codefendants to sever the trials on the grounds of prejudicial joinder, had no objection to the introduction of appellant's incriminating statement, notwithstanding the fact that he had been in custody for 113 days without benefit of counsel at the time the statement was executed.[1/]

The following colloquy occurred as appellant's incriminating statement was read into the record:

"MR. MCGRAIL: With the Court's permission, I would like to read the letter, Your Honor.

"THE COURT: I think that you had better put it in evidence first.

"MR. MCGRAIL: I am sorry. I offer Defendant's Exhibit Number 9 into evidence.

"THE COURT: Mr. Wall [counsel for the government] do you want to state an objection?

"MR. WALL: I do not have any objection, Your Honor.

"THE COURT: Very well, let it be received.

"THE DEPUTY CLERK: Defendant's Exhibit 9, marked received in evidence.

1/ At no time was there proof, or even a proffer of proof, that appellant had been warned of his right to remain silent and that any statements he made would be used against him. Cf., Miranda v. Arizona, 384 U.S. 436 (1966)

(Defendant's Exhibit 9, so marked.)

"MR. MCGRAIL: May I proceed and read it, Your Honor?

"THE COURT: Yes.

"MR. MCGRAIL: Defendant's Exhibit 9 has at the top of one sheet the name, Mr. Reginald E. Gatlin, an address, and then the letter opens to Mr. Thomas McGrail, Union Trust Building, Washington, D. C.

'Dear Sir: I am one Reginald E. Gatlin and I am at the Washington Asylum and Jail at 200 19th Street, Southeast, Washington, D.C., under name of Reginald E. Gatlin, D.C. 115475.

'Sir, I am writing you this letter or epistle of my own free will. I have in no way been threatened and I have not been promised any settlement or payment of any kind.

'This is a statement of facts:

'I, Reginald E. Gatlin, did enter the Big "D" Liquor Store at 4173 Minnesota Avenue, in Northeast Washington, D. C., on the night of December 7, 1964, at or about 7:00 P.M., with the intent to commit robbery; and that your client, one John A. Johnson, was not with me; nor was he with me at any time during the said date of December 7, 1964. I have not given the police any statement, nor have I signed any.

'This is a true statement; signed Reginald E. Gatlin, subscribed and sworn to before me this the 19th day of April, 1964.'

"And then the signature of the Notary who took the -- who notarized the statement, which is hard to read.

"That is all I have of this witness, Your Honor.

"THE COURT: Mr. Wall.

"CROSS EXAMINATION

"By Mr. Wall:

"Q. Mr. Gatlin, what does the word 'epistle' mean?

"A. It means a letter.

"Q. And you wrote this letter, or epistle, yourself?

"A. Yes, I did.

"Q. At no one's suggestion?

"A. No, sir.

"MR. WALL: I have nothing further, Your Honor.

"THE COURT: You may step down." Tr. 509-11

Recent holdings of the Supreme Court make it clear that important procedural safeguards must be required when a person is taken into custody by the police in order to preserve the important substantive rights guaranteed by the Constitution. Without proof of these elementary procedural safeguards, the court has ruled, no confession made in the absence of counsel while the defendant is in police custody may be admitted into evidence. Massiah v. United States., supra; Escobedo v. Illinois, 378 U.S. 478 (1964); Miranda v. Arizona, supra; cf., People v. Donovan, 13 N.Y.2d 148, 193 N.E.2d 628 (1963). These decisions have recognized the integral relationship between procedural safeguards and the constitutional guarantees of the Fifth and Sixth Amendments that "No person . . . shall be compelled in any criminal case to be a witness against himself," and that "the accused shall . . . have the assistance of counsel." These cases require the reversal of appellant's conviction.

In Massiah, the petitioner's incriminating statements were obtained after he had been indicted and released on bail. The statements themselves were procured, through the collusion of a codefendant and government agents, by means of a radio transmitter in the codefendant's car. This eavesdropping device had been installed entirely without petitioner's knowledge or consent. The Court reversed petitioner's conviction, which had been based in part on use of his statements in the automobile, because the procedure had violated his Fifth and Sixth Amendment rights. The Court cited with approval Spano v. New York, 360 U.S. 315 (1959) and stated the following:

> "It was pointed out [in Spano] that under our system of justice the most elemental concepts of due process of law contemplate that an indictment be followed by a trial, 'in an orderly courtroom, presided over by a judge, open to the public, and protected by all the procedural safeguards of the law.' 360 U.S. at 327 (Stewart, J., concurring). It was said that a Constitution which guarantees a defendant the aid of counsel at such a trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding." 377 U.S. at 204.

In Escobedo v. Illinois, 378 U.S. 478 (1964), the Supreme Court was faced with a problem concerning whether "the refusal by the police to honor petitioner's request to consult with his lawyer during the cause of an interrogation constitutes a denial of 'the Assistance of Counsel' in violation of the Sixth Amendment . . .." 378 U.S. at 479; the court held that it was, and, in its opinion, observed:

> "Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination." 378 U.S. at 488.

The Court held in Miranda v. Arizona, 384 U.S. 436 (1966), that the convictions of four defendants, each based in part upon confessions obtained by the police while the accused was not represented by counsel and not warned of his right to remain silent, should be reversed. In stating an affirmative standard with respect to interrogation of an accused person, the Court said:

> "Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed from being compelled to incriminate themselves. We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." 384 U.S. at 467.

> "Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires." 384 U.S. at 470.

While the factual background of Escobedo and Miranda involved interrogation of defendants by the police, certainly the holdings in those cases are not limited to that type of questioning or coercion alone. It is clear, for instance, that admission of a statement made by a defendant in the absence of counsel while not under police interrogation as such -- or not even in police custody -- may constitute compelled self-incrimination prohibited by the Fifth and Sixth Amendments. See Massiah v. United States, supra. cf. Black v. United States, No. 1029, Oct. Term, 1964, 1966 CCH Sup. Ct. Bull.108 (decided November 7, 1966).

It is submitted that there is no essential difference between the issues involved, viz-a-viz the accused, in Massiah, Escobedo and Miranda, where the police were themselves the source of the coercion involved and the instant case, where the precise nature and source of whatever coercion may have existed are unknown.

It is certain that, just as appellant's confession would be inadmissible if presented by the prosecution in its case-in-chief, it could not have been used by the prosecution in rebuttal. Johnson v. United States, 120 U.S. App. D.C. 67, 344 F.2d 163 (1964). Nor is there any reason why the confession should be any more admissible in appellant's trial as part of a codefendant's defense. To permit the introduction of such evidence by a codefendant would equally "jeopardize

the important substantive policies and functions underlying the established rules," (344 F.2d at 166) and would violate "the fundamental fairness essential to the concept of justice," People v. Noble, 9 N.Y.2nd. 571, 574, 175 N.E.2nd 451, 452 (196).

Proof of procedural safeguards must be a pre-requisite to the admission of any statements made by a defendant in police custody. Otherwise, pressures applied outside of the interrogation room -- whether by fellow prisoners, codefendants, police or others -- could result in "confessions" purportedly volunteered by the defendant, which would actually not have been made but for such coercion or if the prisoner had been given an opportunity to consult with counsel or had been adequately warned of his right to remain silent and that any statement made would be used against him. It would be naive to think that the dangers to constitutional rights from police interrogation or eavesdropping as such are any less serious than those created by other kinds of intimidation or coercion. The Supreme Court's opinion in Miranda makes it clear that there is no such distinction in the law:

> "The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant. No distinction can be drawn between statements which are direct confessions and statements which amount

> to 'admissions' of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory. . . .' These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement.' 384 U.S. at 476 (Emphasis added.)

The facts surrounding the decision by appellant to make the statement incriminating himself and purporting to exculpate his codefendant are unknown.[1] It is clear that appellant had requested counsel and that at the time he made the statement no effective counsel had been appointed for him.[2] It is equally certain that this situation would not have existed had not appellant been a pauper unable to retain his own counsel.

1/ See, e.g., **Miranda v. United States**, **supra** at 448: "Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms."

2/ The attorney for codefendant Johnson stated for the record in this regard as follows: "This came to me unsolicited and concerned me no end. My problem is largely muted by the development of the trial, but I, of course, had in my possession a letter from a defendant whom I didn't represent. "Immediately upon getting it, I tried to contact an attorney named Carter--which is beside the point--but anyhow, an attorney who was assigned to represent Mr. Gatlin. I made many an attempt to contact him. As the Court knows, ultimately Mr. Carter was relieved as counsel. I think because he was not--the Court could not even contact him." (Tr. 507).

In any case, it is patently clear that the statement was, to say the very least, of a very unusual nature. Whether or not one finds credible appellant's affirmation that he had written the statement himself "at no one's suggestion," it is at least unusual that such a confession should be couched in the language of the document in question, reciting in detail as it did, that the affiant had "in no way been threatened," had not been promised "any settlement or payment of any kind," that on the night of the crime he "did enter" the liquor store, and that the codefendant was not with the affiant "at any time during the said date." Perhaps even more unusual is the fact that the statement was notarized. Under such circumstances, it does not take much imagination to suspect that someone other than the appellant himself must have had some influence in the making of the statement.

Whether the police, codefendants, fellow prisoners or others were involved, the possibility that someone with influence over appellant coerced him into making--and swearing to under oath--a self-incriminating statement demonstrates forcefully the importance of requiring proof of procedural safeguards before admission of the statement in his own trial. In the present case, there is no record that appellant was ever warned of his privilege to remain silent or that any admissions made by him would be used against him in court. Nor was any waiver shown of either the privilege against self-incrimination or of the right to appointed counsel. Indeed,

appellant had repeatedly sought to exercise his rights and to be represented by counsel. Justice in this case requires that the conviction be reversed so that appellant's rights to counsel and to a trial free from compelled self-incrimination may be protected fully. Black v. United States, supra.

The possibility that independent evidence of appellant's guilt, apart from the confession introduced by the codefendant Johnson, may have been sufficient before the jury to support appellant's conviction is, of course, totally irrelevant. The Supreme Court has consistently held that in such circumstances, irrespective of other proof, introduction of a tainted confession will vitiate the judgment of conviction. Payne v. Arkansas, 356 U.S. 560, 568 (1958); Spano v. New York, 360 U.S. 315, 324 (1959). For, as the New York Court of Appeals noted in a recent case articulating this viewpoint:

> "It cannot be overemphasized that our legal system is concerned as much with the integrity of the judicial process as with the issue of guilt or innocence. The constitutional and statutory safeguards provided for one accused of crime are to be applied in all cases. The worst criminal, the most culpable individual, is as much entitled to the benefit of a rule of law as the most blameless member of society." People v. Donovan, 13 N.Y. 2d 148, 193 N.E.2d 628, 631 (1963).

Donovan, as well as other decision in point by the New York Court of Appeals, regularly have been cited with approval by the United States Supreme Court. See Massiah v. United States, supra; Escobedo v. Illinois, supra.

II. THE GOVERNMENT'S 121 DAYS' DELAY IN SECURING THE INDICTMENT AND THE SUBSEQUENT 140 DAYS' FURTHER DELAY OF THE TRIAL DENIED APPELLANT DUE PROCESS OF LAW AND HIS RIGHT TO A SPEEDY TRIAL.

A. Delay of 121 Days Prior to Service of the Indictment was a Denial of Due Process. The prosecution's case against appellant was complete on December 7, 1964. Nevertheless, it was not until April 5, 1965, that appellant was indicted. During the interim, appellant was confined and without benefit of counsel. He was unable to effect his release on bail. It is submitted that these facts constitute a denial of due process--basic fairness--to appellant as guaranteed by the Fifth Amendment.

In Hedgepeth v. United States, App. D.C. , 364 F.2d 684 (1966), a narcotics case wherein the delay in between arrest and trial was deemed to be principally the fault of appellant, this Court stated:

> "There is no touchstone of time which sets a fixed maximum period that automatically requires application of the Sixth Amendment and dismissal of the indictment. . . . Other factors to be considered are the reasons for the delay, the diligence vel non of prosecutor, court, and defense counsel, and the likelihood, or at least reasonable possibility, that defendant has been prejudiced by the delay. It must be borne in mind that the prosecution, not the defense, is charged with bringing a case to trial." 364 F.2d at 687-88.

In view of the foregoing, it is submitted that no valid reason for the delay can be found in this case, nor that the prosecutor cannot be said to have been diligent in performing

his assigned role. As to the "reasonable possibility" of prejudice to appellant, this Court added the following footnote:

> "The possibility of prejudice from the delay is an important factor in close cases. But the very assumption of the Sixth Amendment is that unreasonable delays are by their nature prejudicial." 364 F.2d at 687, n.3.

This is not a close case. There can be no doubt that appellant had done nothing which contributed to the delay; it was merely a case of governmental neglect.[1/] This is not to say, however, that there was no prejudice here. Appellant sat in jail for almost four months without being able to secure bail or to prepare a defense. Because of the government's neglect, appellant was unable to act for want of counsel. Indeed, during the delay, appellant, for reasons unknown and without guidance by counsel, prepared a most peculiar document which amounted to a confession of guilt.

In short, it is respectfully submitted that, where the government delays over three months[2/] for no apparent

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1/ Perhaps the delay was purposeful, the intent being to keep other possible defendants from using sworn prior statements of government witnesses during subsequent trials.

2/ Appellant herein concedes that it may have taken the government three or four weeks to procure an indictment, bring the case to trial, or, at least, to permit appellant to secure appointed counsel.

reason in bringing an indictment against an accused after its case against said accused has been completed and during which time the accused is in custody without benefit of counsel, appellant was denied his right to due process of law and his conviction must be reversed. See also Powell v. United States, 122 App. D.C. 229, 352 F.2d 705 (1965). Further, the court below abused its discretion, under Fed. R. Crim. P. 48(b), by denying appellant's timely motions to dismiss the indictment because of the unexcused delay in this case.

B. Delay in Bringing the Case to Trial from April 9, 1965, until August 24, 1965, in View of the Preceding Delays, Denied Appellant His Right to a Speedy Trial. Following the four month's delay in securing the indictment, appellant was arraigned on April 9, 1965, at which time counsel was finally appointed. The appointed counsel, however, was never heard from again. The case was set for trial on May 31, 1965, but the date was subsequently changed to June 7, 1965 at government request. On June 7, 1966, it was learned that appellant still was without counsel and Mr. Liff was appointed by the court and a new trial date of June 28, 1965 was set. Mr. Liff could not proceed with appellant's defense in so short a period of time.[1/] Thereupon, the trial date was set

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1/ See Motion to Dismiss Indictment for Denial of Right to Speedy Trial, Filed August 13, 1965, by Mr. Liff on behalf of appellant.

for August 12, 1965. On August 13, 1965, appellant filed a motion to dismiss the indictment for denial of his right to a speedy trial; the motion was denied. Trial actually commenced on August 24, 1965, or 261 days after arrest, 141 days after indictment, and 79 days after appointment of effective counsel. Therefore, one-half year passed before appellant even had the opportunity to begin to prepare a defense and, from that late start and including a period of recess, another three and one-half months were necessary in order to enable appellant to be prepared for trial. It is clear that appellant was not accorded his right to a speedy trial under the Sixth Amendment, nor has the government fulfilled its duty of "bringing [the]. . . case to trial." Hedgepeth v. United States, App. D.C. , 364 F.2d 684, 688 (1966).

No part of the time concerned here can be said to have occurred because of appellant's failure to proceed; from the late opportunity to obtain counsel, the case proceeded in a reasonable manner. It is purely the fault of the government, however, that appellant's delay from June to August was necessary, and surely the delay of one-half year can be explained only in terms of governmental action or inaction, which was negligent, oppressive and/or arbitrary. See Smith v. United States, 331 F.2d 784 (D.C. Cir. 1964).

To conclude, it is submitted that the delay of 261 days from the time of the investigation by the government as

to appellant was complete until the date trial commenced was solely the fault of the government, was necessarily prejudicial to appellant,[1] was purposeful, arbitrary and oppressive, and was a violation of appellant's right to a speedy trial, and, therefore, requires a reversal of appellant's conviction by this Court.

III. EVEN IF NOT DENIED THE RIGHT TO A SPEEDY TRIAL APPELLANT SHOULD HAVE BEEN CREDITED FOR TIME SPENT IN POLICE CUSTODY PRIOR TO SENTENCING IN CONNECTION WITH THE OFFENSES FOR WHICH HE WAS SENTENCED.

Even if for some reason this Court should determine that the unwarranted and oppressive delays in prosecution by the government were not such as require dismissal of the charges against appellant, it is plain that, by any standard of justice or equity, appellant should at least receive credit on his sentence for the time he spent in jail awaiting indictment, trial and sentencing. Appellant, as has been pointed out above, was a pauper and had no means of raising money to make bond. There is no reason whatsoever to justify his serving more time in jail because of this condition of poverty than a more affluent person accused and convicted of the same crime would have had to serve. This is all the more so where

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1/ See, e.g., discussion as to prejudice found in Section A of this Part II of Appellant's Argument herein contained.

as here, the delays were entirely the responsibility of the prosecution.[1/]

Under this Court's decision in Short v. United States, 120 App. D.C. 165, 344 F.2d 550 (1965), it is clear that the court below should have applied a credit in imposing sentence on appellant for time which he spent in custody in connection with the offenses or acts for which sentence was imposed. The failure to do so could result in detention for a total period longer by 116 days than the maximum sentence imposed by the judge. This situation should be corrected by this Court by remand of the case for modification of sentence. Ample authority is found in 28 U.S.C. § 2106. See also Yates v. United States, 356 U.S. 363 (1958)(per curiam); and Short v. United States, supra.

In most cases credits are automatically applied by the sentencing judge or by administrative action under 18 U.S.C. § 3568. At the time appellant was sentenced, this statute required the Attorney General to give credit toward service of the sentence imposed by the court "for any days spent in custody for want of bail set for the offense under which sentence was imposed where the statute requires the imposition of a minimum mandatory sentence." However, as became evident to this Court in Short, the phrase "where the

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1/ "It must be borne in mind that the prosecution, not the defense, is charged with bringing a case to trial." Hedgepeth v. United States, App. D.C. , 364 F.2d 684, 688 (1966)

statute requires the imposition of a minimum mandatory sentence" has been administratively interpreted to refer to statutes by which Congress has required that persons convicted of particular crimes "shall suffer imprisonment for not less than" some fixed period. Brief for Appellant, Short v. United States, No. 18,940, p. 53. In the absence of statutory language expressly denying the same credits to persons convicted of crimes having no minimum mandatory sentence--crimes determined to be less serious than those carrying minimum mandatory sentences, as to which Congress has prescribed a mandatory credit--there is no reason for concluding that the courts should remain free to refuse credits to such persons. Id at 54.

This Court determined in Short that the administrative interpretation is contrary to the spirit and intention of Congress in providing for statutory credit. 344 F.2d at 558 (Supplemental Opinion of Fahy and Wright, Circuit Judges). This view was confirmed by Congress in the Bail Reform Act of 1966, P. L. 89-465, 80 Stat. 214 (June 22, 1966). Section 4 of the Act amended 18 U.S.C. § 3568 (1964) to eliminate the "want of bail" and "minimum mandatory sentence" language.[1/]

1/ Section 6 prevents retroactive application of the amendments to 18 U.S.C. § 3568 (1964) by providing as follows:

> "This Act shall take effect ninety days after the date on which it is enacted: Provided, that the provisions of section 4 shall be applicable only to sentences imposed after the effective date."

(Footnote continued)

This new section provides in pertinent part that, as to any person convicted of an offense,

> "The Attorney General shall give any such person credit for any days spent in custody in connection with the offense or acts for which sentence was imposed." 80 Stat. 214, 217.

It is clear from the legislative history of the Bail Reform Act that this amendment was not intended to change existing law, but rather to correct the administrative

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(Footnote continued)
It was anticipated that prisoners sentenced prior to that date would have the benefit of credits applied by the sentencing court under the Short doctrine. Congress did not intend that this proviso should have the effect of abrogating any prisoner's right to full credit. The House Judiciary Committee's report makes this crystal clear and states explicitly that the reason for inclusion of this language was to avoid the possible situation where prisoners already given credit by the sentencing court could obtain a double credit:

> "Amendment No. 17 provides an effective data [sic] provision to give the courts and others 90 days in which to prepare whatever procedures are necessary to evaluate the statute. In order to avoid the possibility of giving prisoners who were previously sentenced double credit for time spent in custody prior to sentence, a proviso has been inserted requiring credit to be recorded only as to sentence imposed on and after the effective date." H.R. Rep. No. 1541, 89th Cong., 2d Sess. 5 (May 18, 1966).

misinterpretation of the credit provision and, in effect, to codify this Court's holding in Short.[1/]

1/ The Senate Judiciary Committee reported as follows on section 4 of the bill:

> "Section 3568 of title 18 presently provides for credit for 'days spent in custody prior to the imposition of sentence . . . for want of bail.' Such credit is limited, however, to violations of a statute which 'requires the imposition of a minimum mandatory sentence.' As a consequence, where such sentence is imposed at the discretion of the judge, there is no assurance under the present statute that the accused will be given credit for time spent in custody prior to his conviction and sentencing.
>
> "Witnesses before both the subcommittees' 1964 and 1965 hearings were unanimous in finding no justification for this restriction. It was observed that the crimes for which Congress has set minimum mandatory sentences are those which are considered so serious that judicial discretion in sentencing should be limited. It is ironic that persons accused of such serious crimes should be assured of receiving credit for pretrial custody, while those convicted of less serious crimes for which no minimum mandatory sentence is required have the benefit of no such assurance.
>
> "S. 1357 therefore eliminates the present restriction by guaranteeing credit for pretrial custody against service of sentences imposed upon conviction of any offense against the United States or violation of the District of Columbia Code, without regard to whether the statute requires the imposition of a minimum mandatory sentence.
>
> "It was also noted by various witnesses before the hearings in 1964 that credit for pretrial custody should include days spent in custody for any reason, not merely 'days spent in custody . . . for want of bail,' as the present statute provides. It was pointed out that persons charged with a non-bailable offense or not released for some reason other than lack of bail should also receive credit

(footnote continued)

Nevertheless, in spite of the clear expression of Congressional intent and this Court's holding in Short, the administrative interpretation of § 3568 continued unchanged at the time appellant was sentenced on October 15, 1965--almost nine months after the Short decision and almost a month after the Senate Judiciary Committee pointed out the continued existence of the problem in S. Rep. No. 750.

Realizing that, because of this interpretation appellant would receive no administrative credit for time served pending sentencing, the court below should have applied the credit itself in imposing sentence. No reason has been shown why the time involved--a total of 116 days--should not be so credited. It is evident that in this case the question of credit was not a matter solely of the discretion with the sentencing judge. Application of the appropriate credit for time served was necessary to avoid the possibility that the imprisonment might exceed the maximum penalty, "which it may not validly do." Short v. United States, supra at 557

(footnote continued)

> for such time against service of any sentence eventually imposed. Accordingly, S. 1357 guarantees credit for 'any days spent in custody in connection with the offense for which sentence was imposed. . . .'" S. Rep. No. 750, 89th Cong., 1st Sess. 21-22 (September 16, 1965) See also H.R. Rep. No. 1541, 89th Cong., 2d Sess. (May 18, 1966).

CONCLUSION

For the foregoing reasons appellant submits that his conviction must be reversed and remanded with instructions that the court below enter a judgment of acquittal; or that a new trial be held; or that a hearing be held on the questions of whether appellant's confession was coerced and should have been excluded from evidence; or that at the very least, appellant's sentence should be modified so as to give him credit for time spent in custody prior to sentencing in connection with the offenses for which he was sentenced.

Respectfully submitted,

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/s/ Michael P. Bentzen
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November 30, 1966

RECEIVED AUG 16 1966

APPENDIX

Mr. Reginald E. Gatlin 115475
Box Youth Center
Morton Va.

Mr. Charles W. Havens III
Covington & Burling
Union Trust Building

Dear Mr. Havens.

I received your letter of August 9, 66. And was glad to hear from you. However you said that you did not think that the hand writing on the indictment would prove to be a fruitful point on appeal. Well I disagree with you. For forgery is forgery no matter who dose it, and there's no doubt in my mine that my indictment was forge. And I'm going to fine out who forge it or press charges. I do however hope that we understand each other, and that we are fighting on the same side.

About that information that you want. I was in the Hosp from 12-7-64 until 12-28-64. On the same day I waived preliminary hearing

And was committed to the D.C. Jail in the
bsence of $50,000 bond to await the
ction of the Grand Jury.
Not until April the 7th 1965, Approximat
91 days later, did the grand jury act.
During this time I was without Counsel
and without funds for this over excesive
bond. No reason has been shown and I
believes no satisfactory reason can be
shown for this bond or for this inordinate
delayed indictment.
By reason of this long and unexplained
delay, Counsel was not appointed until
April 9th 1965, and trial was not set until
June 1st 1965. The Attorney Carter was
appointed on April 9, 1965, and sence that
day I have not seen him to this day.
Mr. Diff had some letters that I
have to him, that I wrote the Court,
the Legal Aid Agency, and other people trying
to find out Mr. Carters where about, and to
get in touch with him, see Mr. Diff about
these letters. I received a letter from

Mr. Life on June the 17 1965, saying that he had been appointed to represent me the court had to make a new date for the first seen Mr Life was just appointed but the date was to soon, So Mr. Life asked for another delay without my ok. Altho he took this upon himself, for he could not get the case together in the time he had befor the trial. You will have to see Mr Life for more information if needed. I hope that this is of some help.

Yours truly
Mrs. Reginald E Statler

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CERTIFICATION

The undersigned hereby certifies that on this 30th day of November, 1966, he has served the foregoing Brief for Appellant on the United States Attorney by causing two copies thereof to be mailed, postage prepaid, to Frank Q. Nebeker, Esq., Assistant United States Attorney, United States Courthouse, John Marshall Place, Washington, D. C.

/s/ Michael P. Bentzen
MICHAEL P. BENTZEN

701 Union Trust Building
Washington, D. C. 20005

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